DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Federal Aviation Administration

[Docket No. 27782]

Policy Regarding Airport Rates and Charges

AGENCY: Office of the Secretary and Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Policy statement; request for comments.

SUMMARY: This document announces DOT and FAA policy on the fees charged by Federally-assisted airports to air carriers and other aeronautical users. The statement of policy was required by the Federal Aviation Administration Authorization Act of 1994, Public Law 103–305 (August 23, 1994). While the policy stated in this document is effective immediately, the Department is requesting further comment on the policy adopted because of substantial industry interest in the proposed policy and because the final policy adopted differs in several respects from the proposal, in response to comments received on the proposal.

DATES: Comments must be received by May 4, 1995.

ADDRESSES: Comments should be mailed, in quadruplicate, to: Federal Aviation Administration, Office of Chief Counsel, Attention: Rules Docket (AGC–10), Docket No. 27782, 800 Independence Avenue, SW., Washington, DC 20591. All comments must be marked: ''Docket No. 27782.'' Commenters wishing the FAA to acknowledge receipt of their comments must include a preaddressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 27782.'' The postcard will be date stamped and mailed to the commenter.

Comments on this Notice may be examined in room 915G on weekdays, except on Federal holidays, between 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: John Rodgers, Director, Office of Aviation Policy, Plans and Management Analysis, Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591, telephone (202) 267–3274; Barry Molar, Manager, Airports Law Branch, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3473.

SUPPLEMENTARY INFORMATION: On June 9, 1994, the Office of the Secretary of Transportation (OST) and the FAA issued two related notices on the subject of Federal policy on airport rates and charges. A notice of proposed policy entitled ''Proposed Policy Regarding Airport Rates and Charges'' listed and explained the principles that the Department believes define Federal policy on the rates and fees that an airport proprietor can charge to aeronautical users of the airport. Docket No. 27782 (59 FR 29874, June 9, 1994). Notice 94–18, a notice of proposed rulemaking entitled ''Rules of Practice for Federally Assisted Airports,'' proposed detailed procedures for the filing, investigation, and adjudication of complaints against airports for alleged violation of Federal requirements involving rates and charges and other airport-related requirements (59 FR 29880, June 9, 1994).

The FAA Authorization Act of 1994, Public Law 103–305 (1994 Authorization Act) was signed into law on August 23, 1994. In response to provisions in the 1994 Authorization Act that specifically address airport rates and charges, the Department issued a supplemental notice of proposed policy with revisions to reflect relevant provisions of the Act. (59 FR 51835, October 12, 1994). The relevant provisions of the 1994 Authorization Act were summarized in the October 12 notice.

The 1994 Authorization Act also required that the Secretary issue two other documents relating to airport fees and finances: first, procedural rules for the resolution of disputes between air carriers and airport owners and operators regarding airport fees; and second, policies and procedures for the enforcement of Federal restrictions on the use of airport revenue. The procedural rules are being published in the **Federal Register** on the same date as this Policy Regarding Airport Rates and Charges; the policies and procedures on revenue use and revenue diversion will be published within the next several weeks.

Summary of Policy Statement

The policy statement being adopted retains the structure of the proposed policy, and is organized into five general principles with supporting guidance for each. In brief, the first principle establishes the continued reliance on direct local negotiation between airports and aeronautical users. The Department is available to resolve the issues raised in a dispute when the airport and aeronautical users are unable to resolve disputes directly.

The second principle restates the legal requirement that rates, fees and charges to aeronautical users must be fair and reasonable, with more detailed guidance on the practices and restrictions that define ''fair and reasonable.'' The guidance for this principle incorporates flexibility to deviate from the proposed policy guidance based on agreement with aeronautical users; recognition that both compensatory and residual pricing approaches are legitimate; standards for the valuation of airport property in establishing rates; prescription of the kinds of costs that can be reflected in the rate base for aeronautical users; and guidance on subsidization of other airports. The policy makes certain distinctions in the reasonable accommodation of air carriers versus other aeronautical users, and does not establish fee standards for rates and charges for nonaeronautical users or limit the amount of revenues generated by nonaeronautical rates and charges.

The third principle restates the legal prohibition on unjustly discriminatory rates and charges.

The fourth principle restates the legal obligation of the airport sponsor to maintain a fee and rental structure that makes the airport as self-sustaining as possible. Supplemental guidance encourages the sponsor of an airport that is not currently self-sustaining to establish long-term goals and targets to make the airport financially self-sustaining. While the requirement that an airport be as self-sustaining as possible under the circumstances existing at the airport is required by statute to be included in each sponsor's grant assurances, and is subject to enforcement by the FAA in accordance with its grant compliance procedures, it is not the intent of the Department that this requirement alone be the grounds for a complaint as to the reasonableness of an airport fee.

The fifth principle restates the basic legal requirements for the application and use of airport revenues. Supplemental guidance on the use of airport revenue has been deleted from the statement of policy on airport fees, and instead will be incorporated in a separate statement of policy on the enforcement of the revenue use provisions of the Airport and Airway Improvement Act of 1982 and the 1994 FAA Authorization Act.

Comments on the Notices of Proposed Policy

The Department received more than 150 comments on the Notice and Supplemental Notice of Proposed Policy. Comments were received from all segments of the airport community, including airport operators and representative organizations;

associations representing air carriers and commuter airlines; representatives of other aeronautical businesses at airports; general aviation representatives; representatives of airport concessionaires; aviation consultants and law firms; and the staff of the Bureau of Economics of the Federal Trade Commission. Many of the comments from airport operators and representatives were similar, and all of the comments tended to focus on certain issues. Accordingly, the following discussion of comments is organized by issue rather than by commenter. Issues are grouped by their applicability generally or to one of the five principles stated in the policy. Airport proprietors and representatives who took the same position on an issue are collectively referred to as ''airports;'' the Air Transport Association (ATA) and other air carrier commenters are referred to as ''air carriers.'' The summary of comments is intended to represent the general divergence or correspondence in industry views on various issues, and is not intended to be an exhaustive restatement of the comments received. All comments received were considered by The Department even if not specifically identified in this summary.

Discussion of Comments Received

The final policy statement includes an expanded introduction that reflects the discussion below.

1. General: Scope of Policy and Procedures

A. Should the policy apply to all aeronautical users or just air carriers?

Airports commented that policy and related procedures should apply only to rates and charges imposed on air carriers. The policy is mandated by § 113 of the 1994 FAA Authorization Act; based on the terms of § 113, the policy should be limited to air carriers. If new policy guidance is needed for fees assessed on other aeronautical users, the issue should be addressed separately. The American Association of Airport Executives (AAAE) and some individual airports specifically objected to the inclusion of foreign air carriers. Commenters suggested that automatic inclusion of foreign air carriers would provide them with valuable rights ordinarily secured through negotiation of intergovernmental agreements.

General aviation commenters stated that the Department should provide the same rights and protections for all aeronautical tenants, not just air carriers. However, the policy should reflect differences in the relationships between air carriers and airports and those between other aeronautical businesses and airports. In particular, more access to evidentiary hearing procedures should be available to non-carrier complainants than proposed by the Department.

In the policy adopted, the Department has continued to apply the policy to rates and charges assessed against all aeronautical users. Existing grant assurances obligate airport proprietors to give access on fair and reasonable terms to all types, kinds, and classes of aeronautical uses. However, where differences exist as a practical matter between air carriers and other kinds of aeronautical users, those differences have either been reflected in the guidance stated in the policy, or the policy will be applied with sufficient flexibility to reflect those differences. Some commenters noted that § 113 of the 1994 Authorization Act applies only to air carriers and argued that the policy statement should be similarly limited. However, § 113 relates only to the procedures for special handling of airport-airline fee disputes; it does not define limits on the applicability of policy.

The policy adopted applies to foreign air carrier rates as well as those imposed on domestic air carriers. The principles and guidance contained in the policy statement are consistent with the provisions of bilateral air service agreements, and the application of the same policy on fair and reasonable airport fees to both foreign and U.S. air carriers is appropriate.

B. Should the policy and procedures apply to rates excluded by section 113?

Airports commented that the policy and implementing regulations should clearly exclude rates and charges specifically excluded by the statute, e.g., rates established by agreement; Congress directed that the policies and procedures not apply to such excluded rates; in addition, the policy should reflect § 47129(f), which states that that section shall not adversely affect the rights of any party under any existing written agreement between an airport and air carrier or the ability of an airport operator to meet its debt obligations.

Air carriers commented that the policy should recognize that it is common for airports to increase fees by asserting that the increase is a routine adjustment to a preexisting agreement, even if the agreement does not allow for such an increase; therefore; the policy should make clear that a dispute as to whether a fee increase is within the terms of a contract or not should be covered by the policy to the same extent as a fee increase imposed in the absence of any agreement.

The policy statement adopted applies to all fees charged to air carriers for aeronautical uses, although the policy itself makes clear that carriers and airport operators have wide latitude to agree on alternate arrangements. The rules for implementation of the dispute resolution procedure provided in § 113 of the 1994 Authorization Act clarify that expedited ALJ procedures will be not be applicable to rates and charges excluded by § 113. However, The Department will consider claims that a fee is not covered by the exclusion because it was not in fact ''imposed pursuant to a written agreement,'' even if a written agreement is in effect. Also, claims that are not subject to the § 113 dispute resolution procedure technically may still be brought under 14 CFR Part 13, which applies to complaints that an airport proprietor has violated the grant assurance that rates and charges for aeronautical users will be fair and reasonable.

C. Should the policy and procedures apply differently to different uses of the airport facilities by air carriers?

Several airports commented that elements of the policy may be appropriate when applied to the airfield and terminal, but would not be appropriate if applied to other facilities leased or used by carriers on the airport. The Department agrees, and the policy adopted makes distinctions, where applicable, between various kinds of facilities on the airport.

D. What airport users/tenants are included within the term ''aeronautical users''?

Airport commenters in particular stated that the term aeronautical user was not clearly defined, and that it was not clear whether the policy applied to certain businesses commonly found on an airport but which arguably are not ''aeronautical'' in nature. Also, representatives of concessionaires who commented on the proposal conceded that concessions such as car rentals were not aeronautical activity, but argued that the rates and charges policy and dispute resolution procedures should apply to concessions.

The final policy statement does not substantially differ from the proposal. The Department believes that in most cases it is immediately clear whether a particular airport business is an aeronautical activity or not within the definition given in the policy. Where an ambiguous situation exists, an airport operator or airport user may contact the FAA Office of Airport Safety and Standards, AAS–300, for a determination.

2. General: Proprietary Powers of Airport Operators

Airports commented that the policy adopted must preserve the airport's right, as landlord, to set fees and charges when consensus is not possible. If the policy establishes narrow federal standards, it would eliminate incentives to set fees and resolve disputes at the local level. Policies should not be so rigid as to stifle innovation that may lead to more efficient financing and management of airport facilities.

Airports argued that the Department especially should not allow carriers to invoke the policy to challenge the wisdom of particular infrastructure enhancement or airport expenditures. Such an outcome would be perceived in the capital market as shifting management prerogatives away from the airport and would result in higher financing costs. The policy, airports argued, should make clear that a fee to cover debt service for a completed project cannot be challenged as unreasonable after the project comes on line and the debt service costs are added to the rate base.

Airports are operated by state or local governmental entities to meet community and national needs. Prior Department statements, including the Government's *amicus curiae* brief to the Supreme Court in *Northwest Airlines* v. *County of Kent, Michigan* (510 U.S. _____; 114 S.Ct. 855; 127 L. Ed. 2d 183 (1994) ''*Kent County*'') and Secretary Peña's December 1993 letter, recognize that airport proprietors have latitude to set fees to meet immediate and longer-term needs of airports. Actions of state and local government are presumed at law to be reasonable and lawful. This same presumption, the airport commenters argued, should apply to the establishment of rates and charges, even when imposed unilaterally by a proprietor through ordinance or regulation. The Supreme Court, in the *Kent County* litigation, recently reaffirmed the standard of reasonableness first enunciated in the *Evansville* decision; this standard afforded substantial deference to the airport proprietor. Airport commenters further argued that in keeping with the presumption of validity, air carriers filing complaints under § 113 of the FAA Authorization Act should bear the burden of proving unreasonableness.

ATA stated that airports possess monopoly power, which in recent years has not been kept in check. Section 113 of the 1994 FAA Authorization Act was enacted to respond to this potential monopoly power by providing for active DOT involvement in airport-carrier disputes, ATA argued, and airports should not be permitted to adopt new fees unilaterally after failing to reach a consensus; such a policy would give airports carte blanche to impose an unreasonable fee.

General aviation representatives commented that at hundreds of general aviation airports operated by local governments, unreasonable economic requirements can be imposed without effective challenge.

In light of the enactment of § 113, the Department believes that it is not at all clear that the presumption of validity normally associated with governmental actions applies to the imposition of airport fees on air carriers. Even before enactment of § 113, some judicial decisions recognized that the traditional presumption may not apply in cases of airport rate-setting. See, for example, *Raleigh-Durham Airport Authority* v. *Delta Air Lines,* 429 F. Supp. 1069, 1083 (D.N.C., 1976); *New England Legal Foundation* v. *Massachusetts Port Authority,* 883 F.2d 157, 169 (1st Cir. 1989) (*Massport II*). In *Kent County,* the Supreme Court applied the relatively deferential standard of the *Evansville* decision in part because the parties invited its use, and the Court noted that the Secretary had discretion to ''apply some other formula (including one that entails more rigorous scrutiny).'' *Kent County,* at _____, n. 14. The policy adopted does not expressly affirm or displace the presumption of validity that may apply to local government actions. In response to comments relating to challenge of project decisions, the Department considers the dispute resolution process to apply to significant disputes actually related to fees, and do not intend to make the process available to challenge particular capital construction projects after the fact under the guise of challenging the reasonableness of associated rates and charges.

3. Local Negotiation and Consultation

Air carriers requested that the final policy include a more specific description of the information that airports are expected to provide to carriers in connection with a fee increase, and one carrier suggested that consultations and information exchange be required rather than just encouraged.

Airports commented that the statement that consultations should be conducted well in advance of changes to fees did not acknowledge that local governments must sometimes act quickly, to avoid revenue shortfalls or for other reasons.

The Department has included, in an appendix to the final policy statement, a brief list of the information that the Department believes would provide carriers the justification for a particular fee and sufficient information to assess the reasonableness of the fee. The information, in summary, is historic financial information for the two years prior to the change in the fee at issue; economic, financial and/or legal justification for the change; aeronautical cost information; numbers of passengers and aircraft operations for the two preceding years; and certain planning and forecasting information. The list is general, for adaptability to different airport and local government accounting and recordkeeping, and is not intended to include every category of information that may be relevant to each fee dispute.

The procedural rules adopted for the resolution of airport-air carrier fee disputes address the exchange of information. Following a complaint under 49 U.S.C. § 47129, if the airport proprietor has not previously made that information available to carriers, the rules provide for discovery. The Department has not acted to require disclosure of information on a fee increase by regulation, but the agency will reconsider that decision if experience indicates that airports are not providing sufficient information to carriers during consultation on fee increases.

In the statement on the timing of consultations, the Department has inserted ''if practical'' in the language suggesting consultation well in advance of a fee change. Finally, in response to the recommendation by several commenters for arbitration or mediation clauses in leases, the Department has added language encouraging the use of alternate dispute resolution in lease and use agreements.

4. Fair and Reasonable Rates: Compensatory and Residual Costs Methodology

Airport commenters generally supported the policy approach that recognizes the discretion of an airport proprietor to establish compensatory or residual methodology, or a combination of the two. Airports also generally accepted the policy that airports could not unilaterally impose a residual system absent carrier agreement, although two commenters suggested that § 113 gives an airport proprietor a right to impose a residual costing methodology even absent agreement.

Air carriers stated that the policy must deal realistically with the fact that excessive revenues can and will be generated by an airport's shifting of all costs to airlines and all profits to itself; the policy should not exclude from

consideration revenues derived from activities such as concessions and parking, which are also the product of aviation activities. Failure to consider such revenues to be ''aviation related,'' carriers argued, is inconsistent with the requirement in § 110 to take all airport revenue into consideration in setting aeronautical fees.

The Department has retained the policy as proposed. The approach requested by ATA was specifically rejected by the Supreme Court in the *Kent County* decision, and § 113 expressly preserves an airport proprietor's right to use a compensatory methodology, which does not require carrier agreement or the cross-crediting of concession revenues. Moreover, § 110 recognizes that airports may depend on revenue generated from non-aeronautical uses for airport capital improvements and other airport system purposes. Accordingly, the policy adopted does not define concessions and parking as aeronautical revenue or require the cross-crediting of concession revenue to carriers. However, as discussed below, terminal costs and other shared costs must be allocated fairly among aeronautical and nonaeronautical users.

5. Fair and Reasonable Rates: Allowable Capital Costs

Airports commented that capital costs allowed in the rate base should specifically include such ''indirect'' costs as debt coverage, cash and capital reserves, and allocation of some airport capital expenditures, *e.g.*, roadways, in the carrier rate base.

ATA did not comment specifically on what capital expenditures should be allocated to aeronautical users, but expressed concerns that airport proprietors are seeking unconstrained rights to generate ''excessive surpluses'' based on airport proprietors' assertions that adequate reserves are necessary.

The final policy clarifies that the reserves and coverage required in bond indentures and other debt instruments, as well as reserves to cover normal income fluctuations and unforeseen contingencies, may be included in the rate base. The final policy statement also clarifies policy regarding what some commenters referred to as ''indirect'' capital expenditures, which the Department understands to refer to airport facilities that support aeronautical use of the airport but which also receive nonaeronautical use, such as airport roads and fire-rescue facilities. The policy provides that costs allocable to both aeronautical and nonaeronautical uses, or shared costs, may be included in a particular rate base if the facility at issue supports the aeronautical activity being charged, and the allocation to aeronautical users is in proportion to the aeronautical purpose and use of the facility.

For example, the costs of roadways on the airport that provide public access to the passenger terminal could not be charged entirely to any class of aeronautical users. However, a portion of roadway costs could be included in the rate base for the terminal building, for example, so long as the portion of the shared costs allocated to terminal users does not exceed an amount that reflects the respective aeronautical and nonaeronautical use of the same facility. The Department does not expect the use of any particular formula for the determination of aeronautical portion of shared costs, because the circumstances may vary. For example, an airfield crash-fire-rescue facility may exist primarily to support Part 121 air carrier operations, but may actually be used primarily for landside public emergency calls. An airport proprietor must be able to justify the reason for the allocation used.

6. Fair and Reasonable Rates: Imputed Interest and Rate of Return

Airports argued that the final policy should expressly provide that while the rates charged to aeronautical users cannot exceed costs of providing services, those costs should be considered to include a reasonable rate of return on investment; the return should apply to all internally generated funds, regardless of source; a reasonable rate of return would permit an airport proprietor to accumulate cash reserves, which may be necessary as a condition of financing agreements and to compensate a proprietor for the risk of undertaking a particular investment; and allowance of rate of return will assure that the Department's policy is consistent with Article 10 of the United States-United Kingdom Air Services Agreement (''Bermuda 2''), which permits a competent charging authority to recover a reasonable return. Airport commenters further argued that airport proprietors should be permitted to recover the implicit cost of capital for internally generated funds without regard to source, aeronautical or nonaeronautical; in addition, the rate allowed should be the highest of either the rates of return available on the proprietor's investment at the time of the capital expenditure (lost investment opportunity rates) or the cost of borrowed funds available to the airport proprietor at the time of the expenditure; rates prevailing on bonds at similarly-sized airports is not appropriate because other airports may have different credit ratings and, therefore, different capital costs.

ATA argued that routine inclusion of ''implied capital costs'' is inconsistent with the concept of dedicated aviation resources; an airport should not be allowed to collect interest for use of its own reserves; allowance of implied capital costs is a device to generate more revenue than is needed for airport purposes in violation of the congressional direction that airports should not seek to accumulate excessive reserves.

The final policy adopted by the Department continues to permit the charge of imputed interest on the expenditure of airport funds generated from non-aeronautical sources, but not on those generated from aeronautical uses. While ATA is correct that all reserves must generally be used for airport purposes, Federal law does not require that the funds be used for aeronautical activities. Therefore, an airport decision to fund an aeronautical activity is an investment choice that benefits aeronautical users, and the reasonable costs of that investment, including imputed interest, are appropriately recoverable in the aeronautical rate base. The policy provides that the borrowing rate, rather than interest obtainable, is the appropriate measure of reasonable imputed interest for a public entity.

The Department does not agree with the comment that imputed interest should be allowed for the use of funds generated by aeronautical uses. First, a rate of return or imputed interest on the use of aeronautical revenues is not necessary for bond coverage and other reserves, because the policy adopted expressly allows the establishment of such reserves as a direct cost. Second, the use of any reserves generated from aeronautical revenues does not carry with it any implicit cost to the airport for the use of capital, since the reserve was generated by direct charge to users; the Department sees no justification for an additional charge for the use of these funds for the purposes for which they were collected.

To the extent that airports would justify a particular rate of return policy on the basis of bilateral agreements such as Bermuda 2, that reliance is misplaced; Bermuda 2 does not obligate the United States to permit its airports to earn a rate of return; rather the provision requires that each country recognize the other's authority to permit its airports to earn a rate of return on assets, after depreciation, to the extent provided by the domestic law of each country.

7. Fair and Reasonable Rates: Allowable Environmental Costs

Airport commenters stated that the proposed limitation of allowable costs to reasonable environmental costs should be stricken; the costs of compliance with all Federal, state, and local environmental mandates, including clean air and clean water requirements, mitigation required to obtain approvals for development projects, and all expenditures for noise mitigation should be includable in the rate base; the policy should clarify that mitigation (such as wetlands replacement) may occur on or off airports. Also, airports argued, because the airport proprietor is liable for noise damages, the sponsor's judgment in developing a noise mitigation program should be given deference. Airport commenters also argued that the limitation to *current* expenditures for environmental costs should be removed; airports should have discretion to include in the rate base reserves to fund any future liability for cleanup of environmental contamination likely to result from current operations.

The carrier view is that airport proprietors should not be permitted to prefund future environmental liability for environmental remediation, other than through documented self-insurance requirements, subject to standard industry conventions and practices.

The final policy statement adopted by the Department adds language clarifying that the following environmental costs, to the extent actually incurred by the airport proprietor, will be presumed to be reasonable costs:

- Costs of complying with Federal, state, and local environmental laws and regulations, provided that, in the case of local requirements, such requirements are applied to other similarly situated enterprises (to avoid possible impermissible use of airport revenues).
- Mitigation requirements on or off airport associated with airport development (for aeronautical use).
- Noise mitigation pursuant to an approved Part 150 program or other publicly-disclosed airport noise compatibility program;
- Costs of insurance or self-insurance for correction or cleanup of environmental damage. The Department agrees with carrier comments that considerations of forward financing of environmental cleanup costs do require some limitation on the charge to current users, and the policy limits self-insurance costs to costs incurred pursuant to a formal self-insurance program that meets applicable insurance industry standards.

8. Fair and Reasonable Rates: Facilities Currently in Use

Airports asserted that the only restriction in current law is that costs must relate to the development or improvement of an existing airport; the restriction to the costs of facilities in use is overly restrictive and not supported by law. Airports argued that land and construction costs should be recoverable before a facility is in use; the proposed policy does not even clearly permit recovery of costs for borrowing to finance improvements until project completion, which could lower bond ratings and postpone land acquisition, thereby increasing project costs.

Comair praised the currently-in-use limitation on the grounds that it would impose needed discipline on airport expansion policies that show little regard for airline profitability.

The Department continues to believe that the traditional approach of limiting recovery of costs to facilities in use is clear, easy to administer, widely accepted, and supported by judicial decisions. Accordingly, the final policy statement continues to provide that only the costs of facilities currently in use may be included in the rate base; financing costs incurred for construction, including debt service and reserves, may be recovered at the time a facility comes on line. Users may, of course, agree to incur present costs for a future facility. The policy continues to provide that current costs of planning for future facilities may be recovered as they are incurred.

9. Fair and Reasonable Rates: Asset Valuation

Airport comments: Airports commented that the proposed limitation on valuation of airport property to historic cost is unduly restrictive; is not required by existing legal interpretations; is inconsistent with existing airport practice and Department policies; is inconsistent with the objective of promoting efficient use of resources; and could interfere with the successful implementation of peak period pricing. Commenters stated that airports typically use various asset valuation methods for their assets, including current cost, fair market value, or the use of inflation indices (although few individual airport proprietors claimed to be using other than historical valuation). In addition, rates and charges for many aeronautical assets are based on percentage of gross revenue. The use of indices and gross revenue formulas is not generally expected to result in rates and charges that reflect historical cost asset valuation.

For many assets that are fully depreciated, including terminals, the use of historic cost valuation would result in a subsidy to carriers in the form of rental rates that did not reflect the value of the facilities. In addition, a strict historic cost requirement could expose airports to claims of unjust discrimination if carriers using newer facilities are charged more than carriers using older facilities that are fully depreciated. At a minimum, some airports urge that the policy make clear that blending of asset values is permitted to avoid this problem.

Further, airports claimed that the use of historic cost valuation may distort the perception of the relative value of existing and new facilities. A new facility may fail the test of economic feasibility based on the disparity between fees based on historic costs of the original facility and those based on current costs of a new facility. Moreover, in the case of gates and other terminal facilities and other facilities such as hangars or flight kitchens, air carriers themselves recognize the value of the facilities by subleasing at rates higher than historic value. A policy requiring airports to value their facilities at historic value would allow airlines to enjoy a windfall in the form of a differential between the market rates they can obtain for subleases and rates paid to the airport based on historic cost. The public interest would be better served, airports argued, if the airport proprietor were able to capture this appreciation through market-based rates and to apply the proceeds for the development of airport infrastructure.

It was also argued that historic cost valuation could limit the effectiveness of peak period pricing. If an airport is unable to reflect the opportunity costs of its scarce assets in its rate base, the maximum peak price that can be charged may not be enough to cause traffic to shift away from the peak period.

The proposed historic cost requirement, in the airports' view, is not supported in law or FAA policy. Decisional law is clear that results, not methodology, are significant in determining reasonableness. In addition, under the *Evansville* standard, a rate is considered reasonable if based on some fair approximation of use and not excessive in comparison with the government benefit conferred. A rate based on the standard of ''benefit conferred'' will in most cases be different from rate based on a facility's historic cost.

Airports also pointed to FAA policy statements that apparently support alternative valuation methods. FAA's Order 5190.6A recommends that long term leases include automatic escalation provisions based on recognized economic indicators. In addition, the Order identifies a fee for use of landing areas based on a specified percentage of ticket sales to enplaning passengers as acceptable. Neither of these methodologies would produce rates based on historic costs.

Finally, airports stated that the DOT Office of the Inspector General (DOT/OIG) has criticized the failure of airports to obtain fair market value for aeronautical rentals. The DOT/OIG position indicates that use of methodologies other than historic cost is at least permitted, if not mandated by assurances relating to maintaining a fee and rental structure that will make the airport as self-sustaining as possible.

Air carrier comments: Air carriers considered the concept of using historic costs for asset valuation to be sound and consistent with Federal law. While parties might mutually agree to another valuation method, the policy must provide that only historic cost valuation may be unilaterally used, to protect against rampant overcharging and accumulation of excess surpluses by airports. Airports have access to capital for replacement of assets without generating excess revenue from other valuation methodologies. The use of historical cost valuation is quickly and easily verifiable and eliminates instability in the rate base.

FTC comments: The staff of the Bureau of Economics of the Federal Trade Commission (FTC) submitted comments on the proposed policy, with the caveat that the comments do not necessarily represent the views of the Commission or of individual commissioners. FTC staff took the position that the requirement to use historic costs will not promote the efficient use of resources. Historic cost valuation will likely result in prices that are below the value of airport facilities. When prices are below the value of facilities, excess demand results. If a community is served by two airports built at different times and fees are based on historic costs, airlines will be attracted to the older, lower-cost airport and avoid the newer, more expensive one. Demand at the older airport would have to be rationed by nonprice means.

Carriers compete by offering connecting service over various hubs. Because fees charged by hub airports are a determinant of air fares, it is important that competition between carriers not be distorted by a pricing system for airport services that reflects the age of facilities, rather than true economic costs.

FTC staff recognized that airport services are not generally produced in competitive markets. Therefore, airport proprietors might possess monopoly market power in pricing their services. However, FTC staff maintained that there are effective means for the Department to regulate the pricing of airport services other than cost of service pricing based on historic costs.

While cost-of-service regulation based on historic costs has typically been used in the United States, FTC staff commented that this approach has a number of defects. Failure to use a pricing system that reflects opportunity costs could lead to greater levels of airport capacity than is warranted by economic efficiency, as excess demand leads to congestion and delays which in turn lead to calls for new capacity.

Even if a cost basis other than historic costs is used, FTC staff believed that cost-of-service regulation can be a source of economic inefficiency. One regulatory alternative that addresses some of these shortcomings is price-cap regulation. Under price-cap regulation, the regulator sets a price ceiling, but the firm is free to charge any price below this ceiling. The price ceiling is adjusted periodically by a factor that is independent of the firm. Price cap regulation has been used in the privatization of nationalized industries in the United Kingdom, including airports, and in the telecommunications industry in the United States.

Final policy statement: The final policy retains the historic valuation principle proposed; for property other than airfield and land, however, the policy permits airport operators to use other valuation methods if the methodology does not result in total aeronautical revenues exceeding total aeronautical costs and if the methodology is applied consistently for similar facilities. If an airport proprietor uses valuation other than historic costs for establishing any aeronautical charge, the airport operator will be responsible for demonstrating that the methodology is justified, upon complaint by an air carrier or other aeronautical user. Where similar facilities have a different historic cost basis, the cost may be averaged across all similar facilities to produce a common rate.

The Department recognizes, as many of the airports and FTC staff commented, that valuation based on other than historic cost may be justifiable in certain situations. Nonetheless, we continue to believe that the use of historic cost asset valuation methodology is consistent with the objectives and direction of the AAIA and Public Law 103-305, in addition to being the most widely accepted methodology under applicable standards for both public finance accounting and ratemaking. The financial and accounting standards issued by the Financial Accounting Standards Board and the Government Accounting Board, which form the basis of Generally Accepted Accounting Principles (GAAP), prescribe historic cost valuation as the accepted accounting convention for valuing the assets of local government enterprise functions such as airports. The valuation of assets for purposes of an accurate financial statement is somewhat different from the objective of establishing lease rates, but does indicate the longstanding general acceptance of historic cost valuation as the standard.

As recognized by commenters on both sides of the cost valuation issue, historic cost has also been the standard for use in the establishment of rates in regulated industries. However, as several commenters noted, the rates charged by airport proprietors are not perfectly analogous to public utility rates, and the Department has not strictly applied the principles of public utility ratemaking law in developing the policy. Nevertheless, many of the reasons for the use of historic cost apply to both public and private enterprise activities. Historic cost is the simplest, most direct, and easiest-to-verify measure of cost. Moreover, in a regulatory system in which the proprietor's revenue is limited to the costs of providing services, historic cost valuation provides for full reimbursement of actual costs incurred by the proprietor. The airport fee policy adopted by the Department does limit the revenue that can be generated from aeronautical uses to the costs of providing services, and historical cost valuation is, therefore, both sufficient and appropriate for determining the amount of revenue (and the limit on reasonable fees) that can be collected for aeronautical uses. The use of an alternative methodology such as replacement cost valuation, for example, would generate funds in excess of past and current costs, and could result in the accumulation of excess funds that could be used for the replacement of the facilities being used or for any other airport purpose. The accumulation of surplus aeronautical revenues for replacement of facilities is not permitted by the policy adopted, which limits charges to recovery of costs for facilities in use. Nor are the surplus funds that

would be generated by replacement cost pricing needed for other purposes, since aeronautical users can be charged directly for the amounts needed to maintain debt service and coverage reserves, working reserves for normal operations, and contingency funds. Also, surplus funds for any airport purpose can be accumulated from revenues generated by nonaeronautical uses, which are not covered by the policy. In summary, historical cost valuation is the most widely used and accepted valuation methodology; it reimburses the airport proprietor fully for costs incurred; and it is consistent with the policy's provision that fees charged to aeronautical users are limited to the costs of services provided.

The Department believes that many of the impacts of historic costs noted by airport commenters would not be as problematic as the commenters suggest. First, historic costs would result in rents substantially below market only where a facility has not been renovated, reconstructed, or replaced for many years. While there are such cases, it would be the exception for airport facilities. Second, increased use of shorter airport leases reduces the instance of potential windfall situations, in which a lessee who pays the airport proprietor a historic cost-based rate is able to sublease at market rates, because the airport proprietor can reallocate the property to the actual user after a shorter time. Third, the policy adopted expressly permits airport proprietors to average the historic cost basis of all property, new and old, in the same general category (e.g., terminal gates). Accordingly, lessees of similar facilities can be charged identical rates regardless of the age and original cost of each facility. Finally, the policy should not result in any significant disruption of existing practice. Historic cost is already the most widely accepted basis for asset valuation; also, existing airport-air carrier agreements and air carrier fees that were not in dispute as of August 23, 1994, are not subject to challenge under the special expedited procedures in any event.

That said, as airport commenters and the FTC staff noted, rates based on historic cost can potentially result in inefficiencies and unintended subsidies. Accordingly, the Department believes that it is reasonable that airport proprietors, where justification exists, have some flexibility to use an asset valuation other than historic cost for the purpose of ratesetting. However, for overall aeronautical fees to be consistent with the provisions of the policy, several limitations will necessarily apply when asset valuation other than historic cost is used to determine some rates. First, aeronautical revenues in the aggregate cannot exceed the cost of aeronautical facilities (valued at historic cost) and services provided, and the use of a valuation higher than historic cost would not increase the total limit on aeronautical revenues since the total cost of aeronautical facilities would continue to be calculated using historic cost. Therefore, charging a market rate not based on historic costs for one category of leased aeronautical facility may require charging less than a full compensatory rate for other facilities used by the same aeronautical users. Second, only historic cost valuation will be considered reasonable for airfield facilities and land. Any potential effects of inefficiency or subsidy would apply particularly to terminal and other landside facilities, which may be exclusively leased. Accordingly, the Department will consider the possibility that a fee based on valuation other than historic cost could be reasonable, but only with respect to facilities other than the airfield, and only to improvements, not land. Finally, because historic cost valuation remains the standard in both public finance accounting and in ratemaking methodology, historic cost asset valuation methodology will be presumed to be reasonable for facilities other than airfield facilities and land. Subject to the general limit on total aeronautical revenue, for facilities other than airfield facilities and land an airport proprietor may demonstrate that an alternate valuation methodology is justified in the circumstances existing at the airport.

The Department believes the policy adopted represents the most reasonable approach to valuation of airport assets, in consideration of the comments received and the policy direction in recent legislation. The policy applies a strict historical valuation standard to core aeronautical use facilities, i.e., the airfield and land. For terminal and exclusively leased areas of the airport the policy permits flexibility in rate methodology and avoids disruption of existing arrangements, while at the same time discouraging accumulation of excess revenues.

The policy adopted is intended to cover the fees for use of aeronautical facilities, and is not intended for strict application to a transfer of assets. The policy applies the general rule that subsequent airport proprietors will acquire the cost basis of assets used in the rate base at the original airport proprietor's historic cost. However, requests for approval of the transfer of airport assets may include requests for deviation from this policy with justification.

FTC staff acknowledged that the monopoly power of airport operators requires some pricing regulation. With respect to the use of price-cap regulation suggested by FTC staff, such an approach does not appear to be feasible. The examples cited by FTC staff represented monopoly or near monopoly regimes where a cap was being set for one, or at most a handful of firms. In contrast, there are more than 400 commercial service airports and thousands of obligated airports that may be subject to the airport fee policy. The Department cannot effectively establish a separate price cap regime for each regulated entity, and it is not clear that the benefits of a price cap regime would be available if the Department were to develop a single industry standard formula. In the U.K. airport context, the British determined different price-cap values for each of the airports covered by the price cap regulation. Finally, the U.S. Government's own experience with price cap regulation of airports in the United Kingdom demonstrates that in order to be effective in preventing excessive returns, price cap regulation must be implemented with care. Among other things, it is important to assure that the base prices relied on do not themselves reflect excessive profits, which in turn makes it necessary to undertake a cost-of-service evaluation of each firm's costs and revenues.

10. Fair and Reasonable Rates: Multiple Airport Systems in the Rate Base

Airports generally commented that it is unduly restrictive to require quantification of the benefits of the secondary airport for inclusion of subsidy costs in the first airport's rate base; benefits will be difficult to quantify, and should be presumed if the airport has been designated as a reliever in the FAA's National Plan of Integrated Airport Systems (NPIAS); also, the blending of rates of multiple airports is an accepted current practice and should continue to be considered reasonable.

The Airports Council International-North America (ACI–NA) requested that common ownership not be a prerequisite of inter-airport cost sharing. ACI–NA notes that FAA permits the transfer of AIP entitlement funds between airports under different sponsorship; there is no reason to impose stricter standards on the airport's own funds, as the benefits of a reliever airport are the same regardless of ownership. AAAE and individual operators of airport systems, including Kansas City and the Metropolitan Washington Airports Authority, agree

with the Department proposal that common ownership be required, but urge that the system proprietor be given wide latitude to blend rates.

Air carriers supported the proposed policy, arguing that while cross-subsidization has at times been troubling, airlines have generally been able to resolve issues at the local level. Carriers stated that the requirement of common ownership should not be eliminated; and commented that it is ironic that airports are interested in subsidizing other airports and at the same time claim insufficient funding to meet their own needs.

The Department has retained the policy as proposed, but have added the clarification that an airport designated by the FAA as a reliever will be presumed to confer a reasonable benefit on users of the primary airport. The Department continues to believe that the best means to assure that benefits of cross-subsidy are commensurate with costs is where cross-subsidy is the result of agreement. In the absence of such an agreement or designation by the FAA as a reliever in the NPIAS, the Department is reluctant to presume that benefit is commensurate, and believe it is reasonable to require that the subsidy reflect a showing of actual benefits.

The requirement for common ownership is retained. The basis for a reasonable fee is the compensation of the airport proprietor for the costs of facilities and services it provides; the proprietor is not providing facilities owned by another sponsor.

The analogy to the transfer of entitlement funds argued by airport commenters is not persuasive. Entitlement funds are Federal funds provided directly to the airport under special criteria for grants, and are not subject to the same standard of reasonableness that applies by statute to any cross-subsidy charged to aeronautical users.

11. Unjust Discrimination: Peak Pricing

Airports supported the recognition in the proposed policy that peak pricing is not per se impermissible; peak pricing can be an effective means of improving efficient use of existing infrastructure. FTC staff also argued that peak pricing would promote economic efficiency and avoid overbuilding of airport assets, and urged that rates during peak periods be permitted to reflect opportunity costs of using scarce resources during peak times.

ATA and the International Air Transport Association (IATA) urged that all references to peak pricing be eliminated; in light of the already complex issues surrounding rates and charges, the Department should not further complicate matters by bringing in extraneous matters in this policy statement. The Regional Airline Association (RAA) commented that peak pricing provides a cloak for unjust discrimination against smaller aircraft operators, since smaller aircraft are less able to absorb the price differential on a per-seat basis; commuter carriers are especially affected because they cannot practically use reliever airports and must schedule during peak times to meet connecting banks of jet operators; peak hour pricing will not expand capacity, and airport operators favor peak pricing because expanding capacity involves facing difficult political and environmental issues.

The National Air Transport Association (NATA) expressed concern that peak-hour pricing language will be used by airports to justify excessive fees to block or severely limit access by general aviation and on-demand charter operators.

The Aircraft Owners and Pilots Association (AOPA) objected to peak pricing, which would only serve to limit and ration capacity. Airline scheduling practices would remain unchanged, with peak prices being absorbed by the airlines system-wide. Noncommercial general aviation operations could be priced out, even though general aviation does not contribute to congestion at most airports; general aviation represents 5 to 10% of total flight operations at large hub airports and in many instances is able to use shorter parallel runways without affecting the long runways used by airlines.

The National Business Aircraft Association (NBAA) also opposed peak pricing, which it argued should not be used as a substitute for capacity enhancement, and should not be imposed with discriminatory impact on small aircraft operators.

The Department has adopted the policy statement essentially as proposed, although the term ''maximize'' efficient utilization of the airport has been changed to ''enhance'' efficient utilization, a more realistic standard. The peak pricing concept stated in the policy is adopted from the Department's decision in the Massport PACE decision (Order and Opinion, December 22, 1988), and represents no change in existing Department policy. Peak pricing is specifically included in the policy statement to clarify that the new policy language on unjust discrimination does not affect the existing policy on peak pricing.

12. Unjust Discrimination: Charging Differential Based on Status as Nonsignatory Carrier

Airports argue that existing practices and policy recognize an airport proprietor's authority to establish reasonable classifications of carriers, for example signatory and non-signatory carriers, and to charge differential rates accordingly. This practice should not be overturned, even if the premiums assessed result in a rate that exceeds allocated costs.

The Department acknowledges the existing practice, and the final policy statement clarifies that reasonable distinctions, such as between signatory and non-signatory carriers (i.e., carriers that respectively have and have not entered into a use agreement with the airport proprietor), are permitted. However, the limit on recovery of total costs would continue to apply.

13. Financially Self-sustaining: Requirement That General Aviation Airports be Self-sustaining

General aviation commenters expressed concern that the proposed policy did not recognize that commercial circumstances at many airports would not support a rate structure that would both make the airport self-sustaining and permit commercial operators at the airport to earn a profit; the policy should not require proprietors of such airports to adopt unreasonably high fees.

The Department agrees that the requested change is consistent with the intent of the proposed policy. The final policy statement includes language to clarify that Federal law does not require each obligated airport to be self-sustaining, and that the Department recognizes that some airports may not be able to achieve a self-sustaining condition.

14. Financially Self-sustaining: Generation of Surpluses

In general, airport comments supported the approach of the policy statement and endorsed the treatment of § 110 of the FAA Authorization Act as a matter under revenue generation, rather than as a matter relating to the reasonableness of fees. Airports note that some other provisions of the policy, for example the proposed historic cost requirement and limitation on rate of return, could hinder an airport in becoming as financially self-sustaining as possible. ACI–NA urged that the policy be modified to recognize that some airports may never be able to achieve self-sustaining status and that some aeronautical activities may be

beneficial to the public even though they do not produce enough revenue to pay fair market value. AAAE stated that the requirement to make the airport as self-sustaining as possible should be treated as the paramount principle in the review of airport fees; the remaining principles and guidance would follow from that statutory directive.

Air carriers found the statement of the self-sustaining principle in the proposed policy to be consistent with existing law, but urged that the requirement to be self-sustaining be defined in a manner that prohibited airports from accumulating massive surpluses.

Several general aviation commenters stated that the requirement to be self-sustaining should be clarified so that airport proprietors are not compelled to adopt unrealistic fee schedules that preclude aviation businesses from operating profitably.

The Department has retained the policy as proposed, but have modified the statement to clarify that an airport must only be as financially self-sustaining *as possible*; that this requirement does not permit an airport proprietor to establish fees that exceed costs associated with aeronautical users; and that an airport proprietor's decision to charge commercially feasible rates below what might be required to break even does not in itself violate the requirement to be as self-sustaining as possible. Language from § 110 of the 1994 FAA Authorization Act regarding the policy on accumulation of surplus, which was included under the use of revenue section of the proposal, has been moved under the self-sustaining principle in the final policy statement.

The Department does not agree with the AAAE comment that the requirement for an airport to be as self-sustaining as possible should be the primary principle for determination of airport fees, and the policy retains the general structure and emphasis of the proposed policy.

15. Use of Airport Revenues: General Approach.

Airports commented that discussion of the use of airport revenue should expressly refer to the grandfather provision of 49 U.S.C. 47107(b)(2); also, proposed paragraph 5.6 should be modified so that actions listed there are not considered to be revenue diversion per se, but only to warrant FAA inquiry about whether diversion is taking place. Airports further requested that the policy alluded to in the preamble—that FAA will consider accumulation of surpluses in awarding discretionary grants—should not be implemented; that policy is not required by § 507(3) of the AAIA and would penalize airports for preserving a sound financial position.

The City of Los Angeles Department of Airports commented that paragraph 5.6 should be clarified to permit airport revenue to be used to directly or indirectly influence use of the airport system, e.g., for promotional activity.

AAAE commented that the detailed discussion of permissible and impermissible uses of airport revenues should be deleted from the policy statement on rates and charges, on the grounds that Congress mandated a separate policy statement; existing paragraphs should be replaced with a simple statement referring to applicable law and a separate FAA policy statement on revenue use. AAAE further requested that the policies and procedures on revenue diversion should be issued through notice and comment rulemaking, in keeping with the severity of potential penalties.

Air carriers generally supported the proposal. IATA commented that paragraph 5.6 should be modified to state that listed practices are to be regarded as a minimum, and that more practices may be added.

The Department agrees with the AAAE recommendation to state agency policy on use of revenue in a separate document dedicated to revenue diversion policy, and not in the statement on airport fees. Accordingly, much of the language in the proposal has been deleted from the final policy statement. The policy does retain a basic statement of the revenue use requirement and a reference to the statute, and also the statement that the FAA may inquire into a progressive accumulation of surplus. As noted previously, language from § 110 of the 1994 FAA Authorization Act regarding policy on accumulation of surplus, which was included under the use of revenue section of the proposal, has been moved under the self-sustaining principle in the final policy statement.

FAA is issuing a separate policy statement on policies and procedures for enforcement against illegal revenue diversion, as required by § 112 of the 1994 FAA Authorization Act. That statement includes the practices that the Department considers to be diversion of revenue, including the four practices listed in § 112. The Department interprets § 112 as requiring the agency to define the listed practices as diversion, if not otherwise grandfathered, and not merely as a basis for inquiry as suggested by airport commenters. The revenue diversion policy statement includes a separate discussion of the ''grandfather provision'' of § 511(a)(12) of the AAIA. The statement also indicates that FAA's policy will continue to be to consider accumulation of surplus funds as one factor militating against award of discretionary grants.

16. Use of Airport Revenues: Policy on Accumulation of Surpluses

Airports commented that the provision that accumulation of reserves may warrant FAA inquiry should be deleted, as should the provision encouraging conversion of airport surplus into airport improvements, because accumulated surpluses provide tangible benefits to airports. As noted, AAAE requested deletion of the entire discussion of the use of airport revenue.

Air carriers argued that an admonition that accumulation of surplus may warrant an inquiry is not strong enough; the provision should be modified to state that accumulation of surplus *shall* trigger an investigation; encouragement of the use of accumulated surpluses to fund non-AIP eligible projects will exacerbate the tendency of airport proprietors to seek excessive revenues for questionable purposes.

The policy adopted includes the language in the proposal, which reflects existing FAA practice and represents a reasonable balance between the airport's interest in maintaining appropriate reserves and the Government's interest in preventing unnecessary accumulation of surplus funds.

Policy Statement Regarding Airport Fees

For the reasons discussed above, the Department adopts the following statement of policy for airport fees charged to aeronautical users:

Policy Regarding the Establishment of Airport Rates and Charges

Introduction

It is the fundamental position of the Department that the issue of rates and charges is best addressed at the local level by agreement between users and airports. By providing guidance on standards applicable to airport fees imposed for aeronautical use of the airport, the Department intends to facilitate direct negotiation between the proprietor and aeronautical users and to minimize the need to seek direct Federal intervention to resolve differences over airport fees.

Applicability of the Policy

A. Scope of Policy

Under the terms of grant agreements administered by the FAA for airport improvement, all aeronautical users are

entitled to airport access on fair and reasonable terms without unjust discrimination. Therefore, the Department considers that the principles and guidance set forth in this policy statement apply to all aeronautical uses of the airport. The Department recognizes, however, that airport proprietors may use different mechanisms and methodologies to establish fees for different facilities, e.g., for the airfield and terminal area, and for different aeronautical users, e.g., air carriers and fixed-base operators. The Department will take these differences into account if we are called upon to resolve a dispute over aeronautical fees.

B. Aeronautical Use and Users

The Department considers the aeronautical use of an airport to be any activity that involves, makes possible, is required for the safety of the operations of, or is otherwise directly related to, the operation of aircraft. Aeronautical use includes services provided by air carriers related directly and substantially to the movement of passengers, baggage, mail and cargo on the airport. Persons, whether individuals or businesses, engaged in aeronautical uses involving the operation of aircraft, or providing flight support directly related to the operation of aircraft, are considered to be aeronautical users.

In addition, the Department considers that the operation by air carriers or foreign air carriers of facilities such as a reservations center, headquarters office, or flight kitchen on an airport does not constitute an aeronautical activity subject to the principles and guidance contained in this policy statement with respect to reasonableness and unjust discrimination. Such facilities need not be located on an airport. A carrier's decision to locate such facilities is based on the negotiation of a lease or sale of property. Accordingly, the Department relies on the normal forces of competition for commercial or industrial property to assure that fees for such property are not excessive.

C. Applicability of § 113 of the FAA Authorization Act of 1994

Section 113 of the Federal Aviation Authorization Act of 1994 (''Authorization Act''), 49 U.S.C. 47129, directs the Secretary of Transportation to issue a determination on the reasonableness of certain fees imposed on air carriers in response to carrier complaints or a request for determination by an airport proprietor. Section 47129 further directs the Secretary to publish final regulations, policy statements, or guidelines establishing procedures for deciding cases under § 47129 and the standards to be used by the Secretary in determining whether a fee is reasonable. Section 47129(e) excludes from the applicability of § 47129 a fee imposed pursuant to a written agreement with air carriers, a fee imposed pursuant to a financing agreement or covenant entered into before the date of enactment of the statute (August 23, 1994), and an existing fee not in dispute on August 23, 1994. Section 47129(f) further provides that § 47129 shall not adversely affect the rights of any party under existing air carrier/airport agreements or the ability of an airport to meet its obligations under a financing agreement or covenant that is in effect on August 23, 1994.

The Department does not interpret § 47129 to repeal or narrow the scope of the basic requirement that fees imposed on aeronautical users be reasonable and not unjustly discriminatory. Sections 47219(e) and (f) specifically apply the expedited hearing procedures mandated by § 47129(b) and (c) to air carriers, but do not preclude the adoption of policy guidance applicable to fees imposed on aeronautical users other than air carriers.

Therefore, the Department will apply the policy guidance in the case of a dispute over any aeronautical fee, including those described in § 47129(e) and (f).

In addition, as the statute provides, a dispute over matters described by § 47129(e) and (f) will not be processed under the procedures mandated by § 47129. Rather those disputes will be processed under procedures applicable to airport compliance matters in general.

Principles Applicable to Airport Rates and Charges

1. In general, the Department relies upon airport proprietors, aeronautical users, and the market and institutional arrangements within which they operate, to ensure compliance with applicable legal requirements. Direct Federal intervention will be available, however, where needed.

2. Rates, fees, rentals, landing fees, and other service charges (''fees'') imposed on aeronautical users for aeronautical use of airport facilities (''aeronautical fees'') must be fair and reasonable.

3. Aeronautical fees may not unjustly discriminate against aeronautical users or user groups.

4. Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible.

5. In accordance with relevant Federal statutory provisions governing the use of airport revenue, airport proprietors may expend revenue generated by the airport only for statutorily allowable purposes.

Local Negotiation and Resolution

1. In general, the Department relies upon airport proprietors, aeronautical users, and the market and institutional arrangements within which they operate, to ensure compliance with applicable legal requirements. Direct Federal intervention will be available, however, where needed.

1.1 The Department encourages direct resolution of differences at the local level between aeronautical users and the airport proprietor. Such resolution is best achieved through adequate and timely consultation between the airport proprietor and the aeronautical users. Airport proprietors should engage in adequate and timely consultation with aeronautical users about airport fees.

1.1.1 Airport proprietors should consult with aeronautical users well in advance, if practical, of introducing significant changes in charging systems and procedures or in the level of charges. The proprietor should provide adequate information to permit aeronautical users to evaluate the airport proprietor's justification for the change and to assess the reasonableness of the proposal. For consultations to be effective, airport proprietors should give due regard to the views of aeronautical users and to the effect upon them of changes in fees. Likewise, aeronautical users should give due regard to the views of the airport proprietor and the financial needs of the airport.

1.1.2 To further the goal of effective consultation, Appendix 1 of this policy statement contains a description of information that the Department considers would be useful to the carriers and other aeronautical users to permit meaningful consultation and evaluation of a proposal to modify fees.

1.1.3 Airport proprietors should consider the public interest in establishing airport fees, and aeronautical users should consider the public interest in consulting with airports on setting such fees.

1.1.4 Airport proprietors and aeronautical users should consult and make a good-faith effort to reach agreement. Absent agreement, airport proprietors are free to act in accordance with their proposals, subject to review by the Secretary or the Administrator on complaint by the user or, in the case of

fees subject to 49 U.S.C. § 47129, upon request by the airport operator, or, in unusual circumstances, on the Department's initiative.

1.1.5 To facilitate local resolution and reduce the need for direct Federal intervention to resolve differences over aeronautical fees, the Department encourages airport proprietors and aeronautical users to include alternative dispute resolution procedures in their lease and use agreements.

1.1.6 Any newly established fee or fee increase that is the subject of a complaint under 49 U.S.C. § 47129 that is not dismissed by the Secretary must be paid to the airport proprietor under protest by the complainant. Unless the airport proprietor and complainant agree otherwise, the airport proprietor will obtain a letter of credit, or surety bond, or other suitable credit instrument in accordance with the provisions of 49 U.S.C. 47129(d). Pending issuance of a final order determining reasonableness, an airport proprietor may not deny a complainant currently providing air service at the airport reasonable access to airport facilities or services, or otherwise interfere with that complainant's prices, routes, or services, as a means of enforcing the fee, if the complainant has complied with the requirements for payment under protest.

1.2 Where airport proprietors and aeronautical users have been unable, despite all reasonable efforts, to resolve disputes between them, the Department will act to resolve the issues raised in the dispute.

1.2.1 In the case of a fee imposed on one or more air carriers or foreign air carriers, the Department will issue a determination on the reasonableness of the fee upon the filing of a written request for a determination by the airport proprietor or, if the Department determines that a significant dispute exists, upon the filing of a complaint by one or more air carriers or foreign air carriers, in accordance with 49 U.S.C. 47129 and implementing regulations. Pursuant to the provisions of 49 U.S.C. 47129, the Department may only determine whether a fee is reasonable or unreasonable, and may not set the level of the fee.

1.2.2 In the case of fees imposed on other aeronautical users, the Department will first offer its good offices to facilitate parties reaching a successful outcome in a timely manner. Prompt resolution of these disputes is always desirable since extensive delay can lead to uncertainty for the public and a hardening of the parties' positions. Air carriers and foreign air carriers may request the assistance of the Department in advance of or in lieu of the formal complaint procedure described in 1.2.1.; however, the 60-day period for filing a complaint under § 47129 is not extended or tolled by such a request.

1.2.3 In the case of fees imposed on other aeronautical users, where negotiations between the parties are unsuccessful and a complaint is filed alleging that airport fees violate an airport proprietor's federal grant obligations, the Department will, where warranted, exercise the agency's broad statutory authority to review the legality of those fees and to issue such determinations and take such actions as are appropriate based on that review.

1.3 Airport proprietors must retain the ability to respond to local conditions with flexibility and innovation. An airport proprietor is encouraged to achieve consensus and agreement with its airline tenants before implementing a practice that would represent a major departure from this guidance. However, the requirements of any law, including the requirements for the use of airport revenue, may not be waived, even by agreement with the aeronautical users.

Fair and Reasonable Fees

2. Rates, fees, rentals, landing fees, and other service charges (''fees'') imposed on aeronautical users for the aeronautical use of the airport (''aeronautical fees'') must be fair and reasonable.

2.1 Revenues from aeronautical fees (aeronautical revenues) may not exceed the costs to the airport proprietor of providing airport services and facilities currently in aeronautical use (aeronautical costs) unless otherwise agreed to by the affected aeronautical users.

2.1.1 Aeronautical users may receive a cross-credit of nonaeronautical revenues only if the airport proprietor agrees. Agreements providing for such cross-crediting are commonly referred to as ''residual agreements'' and generally provide a sharing of nonaeronautical revenues with aeronautical users. The aeronautical users may in turn agree to assume part or all of the liability for non-aeronautical costs, or an airport proprietor may cross-credit nonaeronautical revenues to aeronautical users even in the absence of such an agreement, but an airport proprietor may not require aeronautical users to cover losses generated by nonaeronautical facilities except by agreement.

2.1.2 In other situations, an airport proprietor assumes all liability for airport costs and retains all airport profits for its own use in accordance with Federal requirements. This approach to airport financing is generally referred to as the compensatory approach.

2.1.3 Airports frequently adopt charging systems that employ elements of both approaches.

2.1.4 Federal law does not require a single approach to airport financing. Rates may be set according to a residual or compensatory rate-setting methodology, or any combination of the two, or according to a new rate-setting methodology, as long as the methodology used is applied consistently to similarly situated aeronautical users and as otherwise required by this policy. Airport proprietors may set rates for aeronautical use of airport facilities by ordinance, statute or resolution, regulation, or by agreement.

2.2 The ''rate base'' is the total of all aeronautical costs that may be recovered from aeronautical users through aeronautical fees. Airport proprietors must employ a reasonable, consistent, and ''transparent'' (i.e., clear and fully justified) method of establishing the rate base and adjusting the rate base on a timely and predictable schedule.

2.3 In the absence of an agreement with aeronautical users, costs that may be included in the rate base (allowable costs) are limited to all operating and maintenance expenses directly and indirectly associated with the provision of aeronautical facilities and services (including environmental costs, as set forth below); all capital costs associated with the provision of aeronautical facilities and services currently in use, as set forth below; and current costs of planning future aeronautical facilities and services.

2.3.1 Where airport proprietors have expended funds from nonaeronautical sources to finance capital investments for aeronautical use, the implicit capital cost of these funds may be included in the aeronautical rate base in addition to the cost of the asset. The Department considers it reasonable to use, as a measure of the implicit capital cost, the rate of interest prevailing on bonds issued for a comparable purpose at the time of the expenditure at that airport or at another airport with similar bond rating.

2.3.2 Airport proprietors may include reasonable environmental costs in the rate base to the extent that the airport proprietor incurs a corresponding actual expense. All revenues received based on the inclusion of these costs in the rate base are subject to Federal requirements on the use of airport revenue. Reasonable environmental costs include, but are not necessarily limited to, the following:

(a) The costs of investigating and remediating environmental contamination caused by aeronautical operations at the airport at least to the extent that such investigation or remediation is required by or consistent with local, state or federal environmental law, and to the extent such requirements are applied to other similarly situated enterprises.

(b) The cost of mitigating the environmental impact of an airport development project (if the development project is one for which costs may be included in the users' rate base), at least to the extent that these costs are incurred in order to secure necessary approvals for such projects, including but not limited to approvals under the National Environmental Policy Act and similar state statutes;

(c) The costs of aircraft noise abatement and mitigation measures, both on and off the airport, including but not limited to land acquisition and acoustical insulation expenses, to the extent that such measures are undertaken as part of a comprehensive and publicly-disclosed airport noise compatibility program; and

(d) The costs of insuring against future liability for environmental contamination caused by current aeronautical activities. Under this provision, the costs of self-insurance may be included in the rate-base only to the extent that they are incurred pursuant to a self-insurance program that conforms to applicable insurance industry standards for self-insurance practices.

2.3.3 Airport proprietors are encouraged to establish fees with due regard for economy and efficiency.

2.3.4 The airport proprietor may include in the rate base amounts needed to fund debt service and other reserves and to meet cash flow requirements as specified in financing agreements or covenants (for facilities in use); to fund cash reserves to protect against the risks of cash-flow fluctuations associated with normal airport operations; and to fund reasonable cash reserves to protect against other contingencies.

2.3.5 The airport proprietor may include in the rate base capital costs in accordance with the following guidance, which is based on the principle of cost causation:

(a) Costs of facilities directly used by the aeronautical users may be fully included in the rate base, in a manner consistent with this policy. For example, the capital cost of a runway may be included in the rate base used to establish landing fees.

(b) Costs of airport facilities used for both aeronautical and non-aeronautical uses (shared costs) may be included in a particular aeronautical rate base if the facility in question supports the aeronautical activity reflected in that rate base. The portion of shared costs allocated to aeronautical users should not exceed an amount that reflects the aeronautical purpose and proportionate aeronautical use of the facility in relation to nonaeronautical use of the facility, unless the affected aeronautical users agree to the allocation. Aeronautical users may not be allocated all costs of facilities that are used by both aeronautical and nonaeronautical users unless they agree to that allocation.

2.4 Airport proprietors must comply with the following practices in establishing the rate base, provided, however, that one or more aeronautical users may agree to a rate base that deviates from these practices in the establishment of those users' fees.

2.4.1 Airport assets included in the rate base must be valued according to their historic cost to the original airport proprietor. Subsequent airport proprietors generally shall acquire the cost basis of an asset at the original airport proprietor's historic cost.

(a) For facilities other than airfield facilities and land, an airport proprietor may use valuation methodologies other than historic cost valuation as set forth above, so long as total aeronautical revenues do not exceed the total costs (based on historic costs) included in the aeronautical rate base, and so long as the valuation method is justified and applied on a consistent basis to comparable facilities.

(b) Where comparable assets, e.g., two runways or two terminals, were built at different times and have different historic costs, the airport proprietor may combine the cost basis of the comparable assets to develop a single cost basis applicable to all such facilities.

2.4.2 The costs of facilities not yet built and operating may not be included in the rate base. However, the debt-service and other carrying costs incurred by the airport proprietor during construction may be capitalized and amortized once the facility is put in service. The airport proprietor may include in the rate base the costs of land that facilitates the current operations of the airport.

2.4.3 The rate base of an airport may include costs associated with another airport currently in use only if: (1) The proprietor of the first airport is also the proprietor of the second airport; (2) the second airport is currently in use; and (3) the costs of the second airport to be included in the first airport's rate base are reasonably related to the aviation benefits that the second airport provides or is expected to provide to the aeronautical users of the first airport.

(a) Element no. 3 above will be presumed to be satisfied if the second airport is designated as a reliever airport for the first airport in the FAA's National Plan of Integrated Airport Systems (NPIAS).

2.5 At all times, airport proprietors must comply with the following practices:

2.5.1 Indirect costs may not be included in the rate base unless they are based on a reasonable, transparent cost allocation formula calculated consistently for other units or cost centers of government.

2.5.2 The costs of airport development or planning projects paid for with government grants and contributions and passenger facility charges (PFCs) may not be included in the rate base.

2.5.2(a) In the case of a PFC-funded project for terminal development, for gates and related areas, or for a facility that is occupied by one or more carriers on an exclusive or preferential use basis, the fees paid to use those facilities shall be no less than the fees charged for similar facilities that were not financed with PFC revenue.

Prohibition on Unjust Discrimination

3. Aeronautical fees may not unjustly discriminate against aeronautical users or user groups.

3.1 Unless aeronautical users agree, aeronautical fees imposed on any aeronautical user or group of aeronautical users may not exceed the costs allocated to that user or user group under a cost allocation methodology adopted by the airport proprietor that is consistent with this guidance.

3.1.1 The prohibition on unjust discrimination does not prevent an airport proprietor from making reasonable distinctions among aeronautical users (such as signatory and non-signatory carriers) and assessing higher fees on certain categories of aeronautical users based on those distinctions (such as higher fees for non-signatory carriers, as compared to signatory carriers).

3.2 A properly structured peak pricing system that allocates limited resources using price during periods of congestion will not be considered to be unjustly discriminatory. An airport proprietor may, consistent with the policies expressed in this policy statement, establish fees that enhance the efficient utilization of the airport.

3.3 Relevant provisions of the Convention on International Civil

Aviation (Chicago Convention) and many bilateral aviation agreements specify, inter alia, that charges imposed on foreign airlines must not be unjustly discriminatory, must not be higher than those imposed on domestic airlines engaged in similar international air services and must be equitably apportioned among categories of users. Charges to foreign air carriers for aeronautical use that are inconsistent with these principles will be considered unjustly discriminatory or unfair and unreasonable.

3.4 Allowable costs—costs properly included in the rate base—must be allocated to aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting methodology. The methodology must be applied consistently and cost differences must be determined quantitatively, when practical.

3.4.1 Common costs (costs not directly attributable to a specific user group or cost center) must be allocated according to a reasonable, transparent and not unjustly discriminatory cost allocation formula that is applied consistently, and does not require any air carrier, foreign air carrier or other aeronautical user group to pay costs properly allocable to other users.

Requirement To Be Financially Self-Sustaining

4. Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible.

4.1 If market conditions or demand for air service do not permit the airport to be financially self-sustaining, the airport proprietor should establish long-term goals and targets to make the airport as financially self-sustaining as possible.

4.1.1 Airport proprietors are encouraged, when entering into new or revised agreements or otherwise establishing rates, charges, and fees, to undertake reasonable efforts to make their particular airports as self sustaining as possible in the circumstances existing at such airports.

(a) Absent agreement with aeronautical users, the obligation to make the airport as self-sustaining as possible does not permit the airport proprietor to establish aeronautical fees that exceed the airport proprietor's aeronautical costs.

4.1.2 At some airports, market conditions may not permit an airport proprietor to establish fees that are sufficiently high to recover aeronautical costs and sufficiently low to allow commercial aeronautical services to operate at a profit. In such circumstances, an airport proprietor's decision to charge rates that are below those needed to achieve self-sustainability in order to assure that services are provided to the public is not inherently inconsistent with the obligation to make the airport as self-sustaining as possible in the circumstances.

4.2 In establishing new fees, and generating revenues from all sources, airport owners and operators should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes for which airport revenues may be spent under 49 U.S.C. 47107(b)(1), including reasonable reserves and other funds to facilitate financing and to cover contingencies. While fees charged to nonaeronautical users may exceed the costs of service to those users, the surplus funds accumulated from those fees must be used in accordance with § 47107(b).

Requirements Governing Revenue Application and Use

5. In accordance with relevant Federal statutory provisions governing the use of airport revenue, airport proprietors may expend revenue generated by the airport only for statutorily allowable purposes.

5.1 Additional information on the statutorily allowed uses of airport revenue is contained in separate guidance published by the FAA pursuant to § 112 of the FAA Authorization Act of 1994, which is codified at 49 U.S.C 47107(l).

5.2 The progressive accumulation of substantial amounts of airport revenues may warrant an FAA inquiry into the airport proprietor's application of revenues to the local airport system.

Issued in Washington, DC, on January 30, 1995.

Federico Peña,

Secretary of Transportation.

David R. Hinson,

Administrator, Federal Aviation Administration.

Appendix 1—Information for Aeronautical User Charges Consultations

The Department of Transportation ordinarily expects the following information to be available to aeronautical users in connection with consultations over changes in airport rates and charges:

1. Historic Financial Information covering two fiscal years prior to the current year including, at minimum, a profit and loss statement, balance sheet and cash flow statement for the airport implementing the charges.

2. Justification. Economic, financial and/or legal justification for changes in the charging methodology or in the level of aeronautical rates and charges at the airport. Airports should provide information on the aeronautical costs they are including in the rate base.

3. Traffic Information. Annual numbers of terminal passengers and aircraft movements for each of the two preceding years.

4. Planning and Forecasting Information.

(a) To the extent applicable to current or proposed fees, the long-term airport strategy setting out long-term financial and traffic forecasts, major capital projects and capital expenditure, and particular areas requiring strategic action. This material should include any material provided for public or government reviews of major airport developments, including analyses of demand and capacity and expenditure estimates.

(b) Accurate, complete information specific to the airport for the current and the forecast year, including the current and proposed budgets, forecasts of airport charges revenue, the projected number of landings and passengers, expected operating and capital expenditures, debt service payments, contributions to restricted funds, or other required accounts or reserves.

(c) To the extent the airport uses a residual or hybrid charging methodology, a description of key factors expected to affect commercial or other nonaeronautical revenues and operating costs in the current and following years.

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